Ng Kim Hwa v Ng See Chow & Ors

HIGH COURT (MUAR) — CIVIL SUIT NO 22(23)–10–92
RICHARD TALALLA J
16 JANUARY 1993

Civil Procedure *— Third party proceedings— Summary judgment against third party — Whether courts have power to order summary judgment in third party proceedings — Rules of the High Court 1980 O 16 r 4(3)(a)*

Insurance *— Claims — Period specified to in the policy had expired when claim was made — Right of insured to claim an indemnity from the insurance company — Principles applicable*

The plaintiff was the registered proprietor of a piece of land. The document of title was in the hands of his solicitor. The solicitor passed away and the matter in respect of the title was taken over by a firm of solicitors ('the firm'). The title came to be transferred to and registered in the name of the first defendant who charged it to the second defendant. The third defendant was a partner in the firm. The plaintiff claimed that it was the third defendant who attested the purported thumb impression of the transferor on the form of transfer of the land from the plaintiff to the first defendant and that he was negligent in doing so resulting in the plaintiff's title being lost to the first defendant. The third defendant is likewise alleged to have attested the signature of the transferee in the said form. The defence of the third defendant is a denial of negligence on his part. Pursuant to the provisions of O 16 of the Rules of the High Court 1980 ('the RHC'), the third defendant caused to be issued a third party notice to a third party claiming to be indemnified under the terms of a policy of insurance issued by the third party in favour of the partners of the firm against the plaintiff's claim against the third defendant. The third defendant entered an appearance to the notice and took out a summons in those proceedings wherein he sought against the third party, inter alia, summary judgment for a declaration that any damages for negligence and costs that the third defendant may have to meet as a result of the plaintiff's claim against him be paid by the third party. It was argued on behalf of the third party that there was no power in the court to order summary judgment in third party proceedings and that the period of insurance specified in the policy was from 20 September 1986 – 19 September 1987 and the policy had expired when the claim was made in 1992.

Held, dismissing the application:

(1) The court is empowered to order summary judgment in third party proceedings under O 16 r 4(3) of the RHC in appropriate cases. The instances in which this will happen are rare. In this case, there is nothing objectionable to the third defendant asking

for the declaration but he is not to have it summarily because he is entitled to it only if he is found liable to the plaintiff and thereafter establishes his claim against the third party.

(2) In an insurance claim, provided the actual claim is made during the period of insurance it does not matter when the actual negligent act, error or omission giving rise to the claim took place. The test of policy cover is to see whether at the time the claim was made the policy was in force. The claim by the third defendant was made in 1992 well after the period referred to in the policy.

(3) In the circumstances the third defendant cannot have a declaratory order summarily but instead there should be the usual directions in the third party proceedings for pleadings.

[Bahasa Malaysia summary

Plaintif merupakan pemilik berdaftar sebidang tanah. Dokumentasi hakmilik berada di dalam tangan peguamnya. Peguam itu telah meninggal dunia dan perkara yang berkaitan dengan hakmilik itu telah diambilalih oleh sebuah firma peguambela ('firma itu'). Hakmilik itu dipindahmilik kepada dan didaftarkan di dalam nama defendan pertama yang mengadainya kepada defendan kedua. Defendan ketiga merupakan seorang rakan kongsi firma itu. Plaintif mendakwa bahawa defendan ketiga yang telah memperakui tanda cap jari pemindah di atas borang pindahmilik tanah itu daripada plaintif kepada defendan pertama dan bahawa beliau cuai apabila melakukannya mengakibatkan hakmilik plaintif hilang kepada defendan pertama. Defendan ketiga juga dituduh memperakui tandatangan penerima pindahan di dalam borang tersebut. Pembelaan defendan ketiga merupakan suatu penafian kecuaian pada pihaknya. Menurut peruntukan A 16 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT itu'), defendan ketiga telah berjaya mendapat suatu notis pihak ketiga terhadap pihak ketiga menuntut supaya beliau diberi jaminan tanggung rugi di bawah terma suatu polisi insurans yang dikeluarkan oleh pihak ketiga itu memihak kepada rakan kongsi firma itu terhadap tuntutan plaintif terhadap defendan ketiga. Defendan ketiga telah memasukkan kehadiran terhadap notis itu dan mengeluarkan suatu saman di dalam prosiding itu di mana beliau meminta daripada pihak ketiga itu, antara lain, penghakiman terus untuk suatu deklarasi bahawa sebarang gantirugi untuk kecuaian dan kos yang mungkin dialami oleh defendan ketiga disebabkan tuntutan plaintif terhadapnya, dibayar oleh pihak ketiga itu. Telah dihujahkan bagi pihak ketiga bahawa mahkamah tidak mempunyai kuasa untuk memerintahkan suatu penghakiman terus di dalam prosiding pihak ketiga dan bahawa tempoh insurans yang dinyatakan di dalam polisi itu adalah dari 20 September 1986 – 19 September 1987 dan polisi itu telah habis tempohnya apabila tuntutan itu dibuat dalam tahun 1992.

Diputuskan, menolak permohonan itu:

(1) Mahkamah diberi kuasa untuk memerintahkan suatu penghakiman

terus di dalam prosiding pihak ketiga di bawah A 16 k 4(3) KMT itu di dalam kes-kes yang tertentu. Tetapi jarang terjumpa keadaan di mana ini akan berlaku. Di dalam kes ini, tidak terdapat bantahan mengenai deklarasi yang dituntut oleh defendan ketiga tetapi beliau tidak boleh mendapatnya secara terus kerana beliau berhak mendapatnya hanya jika beliau didapati bertanggungan kepada plaintif dan selepas itu membuktikan tuntutan beliau terhadap pihak ketiga itu.

(2) Di dalam suatu tuntutan insurans, asalkan tuntutan dibuat dalam tempoh kuatkuasa insurans tidaklah penting bila perbuatan, kesalahan atau peninggalan yang cuai yang telah mengakibatkan tuntutan itu berlaku. Ujian liputan polisi insurans adalah dengan melihat sama ada pada masa tuntutan itu dibuat polisi itu berkuatkuasa. Tuntutan defendan ketiga itu dibuat pada tahun 1992, lama selepas tempoh yang dinyatakan di dalam polisi itu.

(3) Di dalam keadaan sedemikian, defendan ketiga tidak boleh mendapat perintah deklarasi secara terus tetapi sepatutnya terdapat arahan yang biasa di dalam prosiding pihak ketiga untuk pliding.]

Notes

For a case on summary judgment in a third party proceeding, see 2 *Mallal's Digest* (4th Ed) para 2307.

For cases on insurance claims, see 8 *Mallal's Digest* (4th Ed) paras 7–9.

Cases referred to

1 *The Gloucestershire Banking Co Ltd v Phillipps* 12 QBD 533 (folld)

2 *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363 (folld)

3 *Brice v Wackerbarth* [1974] 2 Lloyd's Rep 274 (refd)

AK Yeong (*AK Yeong & Co*) for the plaintiff.
First defendant in person.
John Matthew (*Shook Lin & Bok*) for the second defendant.
Allen Yu Chin Aun (*Allen Yu Chin Aun & Co*) for the third defendant.
Khoo Eng Chin (*Khoo & Sidhu*) for the third party.

Richard Talalla J: In this action, the plaintiff was the registered proprietor of a piece of land. The issue document of title ('the title') thereto was in the hands of his solicitor. The solicitor passed away and consequently the matter in respect of which the title was in his hands was taken over by a firm of solicitors ('the said firm') whereafter the title came to be transferred to and registered in the name of the first defendant who is said to have charged it to the second defendant.

The third defendant was a partner in the said firm. The plaintiff claims that it was the third defendant who attested the purported thumb impression of the transferor on the form of transfer being the instrument used in the purported transfer of the land from the plaintiff to the first defendant and that he was negligent in doing so inasmuch as the plaintiff was at no

material time present before him and in that he failed to ascertain that the thumb impression was in fact that of the plaintiff resulting in the plaintiff's title being lost to the first defendant who is alleged by the plaintiff to have obtained it fraudulently.

The third defendant is likewise alleged to have attested the signature of the transferee in the said form. The defence of the third defendant is a denial of negligence on his part and a claim that he cannot recall whether he did attest the thumb impression or signature as stated above nor can he identify the two signatures on that form purporting to be his, as his signatures.

Pursuant to the provisions of O 16 of the Rules of the High Court 1980 ('the RHC'), the third defendant caused to be issued a third party notice to the third party claiming to be indemnified by that party under the terms of a policy of insurance issued by the third party, in favour of the partners of the said firm against the plaintiff's claim against the third defendant. The third party entered an appearance to the notice whereupon the third defendant took out a summons in those proceedings wherein he sought against the third party, inter alia, summary judgment for a declaration that any damages for negligence and costs that the third defendant may have to meet as a result of the plaintiff's claim against him be paid by the third party.

It was argued on behalf of the third party that there was no power in the court to order summary judgment in third party proceedings. I do not agree. Order 16 r 4(3)(a) which is similar to the old English O XVI r 52 provides that on an application for direction under this rule, the court may if the liability of the third party to the defendant who issued the third party notice is established on the hearing, order such judgment as the nature of the case may require to be entered against the third party in favour of the defendant and it is under this sub-rule that summary judgment can be given. The instances in which this will happen are rare. In most cases, determination of the question in the third party proceedings necessarily has to await determination of the issues in the plaintiff's action against the defendant. If a third party shows no interest in the proceedings, the defendant may be successful in obtaining summary judgment, as in the case of *The Gloucestershire Banking Co Ltd v Phillipps*,[1] where at p 536, Lord Coleridge CJ has this to say:

> The question is whether a third party who has appeared pursuant to the third party notice and is brought before a judge on an application for directions, but will take no proceeding at all, comes within O XVI r 52? May the judge under that rule, if he is satisfied that there is no question proper to be tried, 'order such judgment as the nature of the case may require' against the third party? In this case the learned judge had the parties before him; he asked what question there was to be tried. The third party would not say. Instead of saying that she had a defence either technical, substantial, or moral, she stood on her supposed rights, and contended that the learned judge could not proceed under r 52 at all. We asked her learned counsel if she had a defence. He says he has no instructions. Will she made an affidavit? She will not. I think that my Brother Field could do nothing else than say, as he did, that he was not satisfied there was anything to be tried, and therefore order such judgment as the justice of the case required, viz, judgment against the third party. This case seems to be exactly within the

A terms of r 52. We cannot hold that the learned judge had no power to make this order, unless we hold that r 52, the very terms of which have been complied with, did not give him power.

In *Post Office v Norwich Union Fire Insurance Society Ltd*[2] at p 373, it was stated:

B ... the insured only acquires a right to sue for the money when his liability to the injured person has been established so as to give rise to a right of indemnity. His liability to the injured person must be ascertained and determined to exist, either by judgment of the court or by an award in arbitration or by agreement.

That is exactly the position that applies in this case. Furthermore, in the C case of *Brice v Wackerbarth*[3] at pp 275 and 276, it was said there that there was nothing to prevent those third party proceedings from going on but the judge had to give his decision in the main action before he could give a decision in the third party proceedings. Likewise in this instance, there is nothing objectionable to the third defendant asking for the declaration but D he is not to have it summarily as he seeks. He is entitled to it only if he is found liable to the plaintiff and thereafter establishes his claim against the third party.

Counsel for the third party submitted that the policy of insurance upon which the third defendant is relying in support of his claim against the third party is in the first place a policy to which the third defendant is not privy. E In the second place, counsel argued, even if the third defendant was privy to the policy the period of insurance stated in the policy had expired when the plaintiff's claim against the third party was made. In this regard, counsel for the third party relied on a passage in *Insurance Law in Australia* by Kenneth Sutton (2nd Ed) at p 73 para 2.60 which reads as follows:

F As indicated, the professional indemnity policy provides cover against any claim made during the currency of the policy irrespective of when the act of negligence occurred. The reason for this is that a considerable period of time may elapse before a negligent act is discovered or the loss ensuing from it accrues and a claim is made. Hence the period within which a claim for breach of professional G duty is made is adopted as the basis of the indemnity, and the insurer accepts the risk that there might be claim arising from some earlier act of negligence during the currency of the policy. Extremely comprehensive questions are usually asked in a proposal form therefore so that the insurer can assess the degree of risk involved. If the criterion of the commission of an act of negligence during the subsistence of the insurance were adopted, it would leave the insurer open to H having to meet a claim perhaps years after the policy had terminated.

Counsel for the third party then referred to the wording of the policy relevant to the instant case and in particular to the terms relating to liability on the part of the third party to indemnify its insured. The terms were to indemnify the insured against any claim or claims which may be made I against him during the period specified in the declaration. The declaration in turn specified a period 20 September 1986 – 19 September 1987. It is stated in the book *Professional Indemnity Insurance* by Peter Madge at p 47 in reference to the words, 'Which may be made against him during the period of insurance' as follows:

Provided the actual claim is made during the period of insurance it does not matter when the actual negligent act, error or omission giving rise to the claim took place. The test of policy cover is to see whether at the time the claim was made the policy was in force.

Even though some specific act or omission may have occurred during the currency of the policy the policy will not apply to any claim based on that specific act or omission if in fact it is a claim against the insured after the policy has lapsed (except as provided for in condition 3 discussed later).

The actual period of insurance is specified in the schedule of the policy and includes 'any subsequent period for which the insured shall pay and the company shall agree to accept a renewal premium'. This latter period will be the period of cover dealt with by the issue of renewal invitations and discussed later.

In the present instance, the claim was made in 1992, well after the period referred to in the policy.

Quite clearly, in the circumstances, the third defendant cannot have a declaratory order summarily but instead there should be the usual directions in third party proceedings for pleadings and so on. A question that arises is whether the third defendant in the light of the submission of counsel for the third party wishes to proceed further in the third party proceedings in respect whereof he may in the end be mulcted in costs.

If the usual directions are given and a statement of claim is filed and served by the third defendant on the third party it may well be that the third party will apply to have the statement of claim struck out pursuant to the provisions of O 18 r 19 of the RHC.

The third defendant, having applied for time to consider the factual position and in particular whether he was covered by insurance with the third party at the time the claim was made and there being no objection, I adjourned the matter.

Order accordingly.

Reported by S Radhakrishnan